IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

HENRY E. COWAN, Superintendent,
Kentucky State Penitentiary,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNSEL FOR RESPONDENT

May 16, 1977

INDEX

Citations

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit granting habeas corpus relief to the respondent is reported as Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976). The order of the Eastern District Court of Kentucky denying habeas corpus relief to the respondent is an unpublished decision. Both opinions are correctly set forth in the Appendix of the petitioner's Petition for Writ of Certiorari (Appendix, hereinafter designated App., pp. 1a-8a; 1d-4d; 1e).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the 5th, 6th and 14th Amendments to the Federal Constitution.

STATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely delineated in the opinion of the United States Court of Appeals for the Sixth Circuit (547 F.2d at 42-43; App., pp. 1a-3a). Those same facts are virtually reiterated in petitioner's Statement of the Facts and of the Case.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

Although petitioner initially suggests that the "important constitutional question presented by this case . . . has not been. . .decided by this Court," respondent submits that the decision of the circuit court in the case sub judice was in absolute conformity with the constitutional principles enunciated by this Court in comparable situations.

This Court has previously held that defendants in criminal cases who assert procedural rights must be treated in a manner that avoids any suggestion of vindictive or retaliatory motive. In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), this Court examined the issue

2

of whether a trial court can impose a more severe sentence upon retrial and reconviction after an accused has successfully challenged his first conviction on appeal. This Court held that, although more severe sentences are not absolutely prohibited, due process requires that the reasons for imposing such sentences upon retrial must affirmatively appear so that an accused may be free, when taking an appeal, of any apprehension of subsequently retaliatory or vindictive sentencing because of his successful appeal. Id., 395 U.S. at 725-26.

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), this Court extended the rule in Pearce to protect the accused against the apprehension of prosecutorial vindictiveness. Perry the accused in Blackledge, was initially charged with a misdemeanor assault with a deadly weapon for an altercation with another inmate which occurred while Perry was incarcerated in prison. After he was convicted in an inferior court in North Carolina and given a sentence of six months confinement, Perry chose to exercise his right under North Carolina law to a trial de novo in the Superior Court. Prior to the inception of the trial de novo, the prosecution obtained an indictment charging Perry with a felony for the same acts for which he had previously been charged with a misdemeanor. The net result was an increase of eleven months in Perry's sentence.

Noting that prosecutors have a "considerable stake" in discouraging new trials, this Court observed that "if the prosecutor has the means readily at hand to discourage such appeals by 'upping the ante' . . . the State can insure that only the most hardy defendants will brave the hazards of a de novo trial." Id., 417 U.S. at 27-28. Consequently, this Court held "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo." Id., 417 U.S. at 28-29.

This Court in Blackledge reasoned that when the circumstances "pose a realistic likelihood of 'vindictiveness' . . . due process of law requires a rule analagous to that of the Pearce case." Id., 417 U.S. at 27.

Pearce and Blackledge therefore establish that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not attributable to a vindictive motive. United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976).

According to the circuit court in the case sub judice, "[t]he concerns expressed in Blackledge have persuaded several lower courts to limit the prosecutor's discretion in related situations." Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976), citing United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); United States v. Butler, 414 F.Supp. 394 (1976); Sefchek v. Brewer, 301 F.Supp. 793 (1969).

Following the constitutional principles enunciated by this Court in Pearce and Blackledge, both supra, as well as their application by lower federal courts in comparable factual situations. the circuit court in the instant case held "that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense." Hayes v. Cowan, supra, at p. 44. The circuit court below concluded that "due process" was "offended by placing [Hayes] in fear of retaliatory action for insisting upon his constitutional right to stand trial" and ruled that Hayes' enhanced punishment

as an habitual offender must be vacated as the product of an unconstitutional action by the prosecutor. Id., at p. 45.

Accordingly, respondent submits that the decision of the circuit court in the case at bar is in complete conformity with the constitutional principles enunciated by this Court in Pearce and Blackledge, both supra. Since the decision in respondent's case involves only the application of previous decisions of this Court to a particular fact situation, the case at bar presents no important question of federal law which has not been settled by this Court.

Petitioner contends that the decision of the circuit court in the case sub judice "severely errodes the role of plea bargaining in the administration of criminal justice" since "a prosecutor may not seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge."

This Court should note that in his Statement of the Facts and of the Case, petitioner candidly concedes that the respondent's "refusal to plead guilty [to the unenhanced forgery indictment] clearly lead to his indictment under the habitual criminal statute." Nevertheless, petitioner suggests that this action by the prosecutor "is no more vindictive than is any other aspect of the plea bargaining process and that the leverage which may be applied by a prosecutor. . . does not impose any unconstitutional penalty for the assertion of rights by one accused of a felony."

In an endeavor to substantiate this argument, petitioner unequivocally asserts that "[t]he state to some degree acts in a coercive and vindictive manner at every important step in the criminal process." This statement by petitioner appears to be a pejorative paraphrase of this Court's observation in Brady v. United States, 397 U.S. 742, 750, 90 S.Ct.

1470, 25 L.Ed. 747 (1970), that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." Certainly, petitioner misconceives a fundamental distinction between the prosecution's use of opportunity or promise of leniency to influence or encourage a guilty plea and the prosecution's threat of seeking more severe charges if an accused declines to plead guilty and instead asserts his constitutional right to plead not guilty.

Indeed, this Court in Brady, supra, declined to hold that a guilty plea is unconstitutional simply because it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." Id., 397 U.S. at 751 (emphasis added). However, this Court refused to extend its approval "to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." Id., 397 U.S. at 751, n. 8.

To justify the admittedly vindictive actions of the prosecutor in the instant case, petitioner has attempted to portray "plea bargaining" as an inherently coercive, vindictive and threatening procedure in which "the prosecutor, not the accused, . . . is in control." Obviously, petitioner's analysis of the normal mode of plea bargaining rejects this Court's observations in Brady, supra, that "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." Id., 397 U.S. at 752. According to this Court, "[i]t is this mutuality of advantage that perhaps explains the fact that well over three-fourths of the criminal convictions in this country rest on pleas of guilty." Id. Within such an atmosphere of

"mutuality of advantage," it is obvious that negotiations for a reduced sentence in exchange for a plea of guilty do not, under normal circumstances, "pose a realistic likelihood of vindictiveness." However, when the accused declines the sentence reductions offered by the prosecutor and refuses to plead guilty, a prosecutor's threat to obtain more severe charges against the defendant unless he pleads guilty is undeniably vindictive and retaliatory in motive.

Recognizing the potential for abuse in plea bargaining, the circuit court in the case at bar emphatically observed that "it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into forgoing his constitutional right to trial." Hayes v. Cowan, supra, at 44.

Vowing disapproval of the practice employed by the prosecutor in the instant case, the Sixth Circuit Court of Appeals noted the findings of the President's Commission of Law Enforcement and Administration of Justice in The Challenge of Crime in a Free Society (1967):

> At the same time the negotiated plea of guilty can be subject to serious abuses. . .There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. . . .(emphasis supplied).

The circuit court below expressed its disagreement with petitioner's argument that "the entire concept of plea bargaining will be destroyed" if prosecutors are precluded from obtaining more severe charges against defendants who refuse to plead guilty. Hayes v. Cowan, supra, at p. 44.

Although acknowledging that "a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment," the circuit court emphasized that the prosecutor "may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial." Id.

Petitioner argues that since "[t]his Court's holding in Pearce and Blackledge and their lower court progeny all relate to situations dealing with other than plea bargaining," the circuit court's "reliance on these cases relative to procedure in the present case was misplaced." A perusal of the federal decisions cited by the circuit court in the instant case reveals the fallacy of petitioner's attempt to distinguish those cases from the situation at bar.

In United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974), the defendants were first indicted for the offense of second degree murder and their initial trial ended with a declaration of mistrial. They were subsequently reindicted for the offense of first degree murder, found guilty by a jury and appealed. The District of Columbia Court of Appeals held that the reindictment of the defendants for first degree murder denied them due process of law, absent any newly obtained objective information justifying the increase in the degree of the crime charged. The Jamison court concluded "that Pearce and Blackledge require restrictions on increased charges after mistrials." Id., at p. 416.

The circuit court below also cited the federal district court decision in United States v. DeMarco, 401 F.Supp. 505 (C.D. Cal. 1975), and noted that "the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses." Hayes v. Cowan, supra, at p. 44. Subsequent to the decision in respondent's

case, the Ninth Circuit Court of Appeals affirmed the federal district court's opinion. United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977). According to the Ninth Circuit, "[u]nder Pearce and Blackledge, it was not constitutionally permissible for the Government to threaten to "up the ante" to discourage DeMarco from exercising his venue right; a fortiori it was constitutionally impermissible to follow up the threat with the California indictment." Id., 550 F.2d at 1227-28.

In United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976), the court discussed the issue of whether it is constitutionally impermissible for the prosecution to bring a more serious charge against a defendant after the defendant has exercised a constitutional right, a common law right, or a statutory right. In the cited case, the defendant was charged with the misdemeanor offense of unlawful entry in violation of 18 U.S.C. §1325. That statute provides that first offenders are guilty of a misdemeanor, while multiple offenders are guilty of a felony. Although the prosecution was aware that the defendant was a multiple offender, it chose to charge him with a misdemeanor before the magistrate. After pleading not guilty to the misdemeanor, the defendant refused to sign a waiver of his right to be tried by a district judge as well as any right he had to a jury trial. Thereafter, the prosecution obtained a two-count indictment charging the defendant with a felony violation under 8 U.S.C. §1325 as a multiple offender and with a violation of 8 U.S.C. §1326, the felony crime of unlawful reentry. The defendant moved to dismiss the indictment on grounds that the increase in the severity of the charges violated his constitutional due process rights under the Fifth Amendment. However, that motion was denied. After a trial before the District Court, the defendant was found guilty.

The Court in Ruesga-Martinez held:

> Pearce and Blackledge therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charge was not motivated by a vindictive motive. Id., at p. 1369.

The Court in Ruesga-Martinez also found "no merit in appellee's suggestion that the power of the prosecution to adjust the charges against an accused at will inheres in its power to engage in plea bargaining." Id., at pp. 1370-1371.

As the foregoing trilogy of federal decisions indicates, a prosecutor's reindictment of an accused on more severe charges following the exercise by the defendant of a procedural right calls into play the constitutional principles delineated by this Court in Blackledge. It is of no import that the procedural right is exercised within the context of plea negotiations. Blackledge and Pearce each establish "a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation." United States v. DeMarco, supra, 550 F.2d at 1227. The prophylactic rule "is designed not only to relieve the defendant who has asserted his right from bearing the burden from 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." Id.

Accordingly, the decision of the circuit court in the instant case to apply the constitutional safeguards of Pearce and Blackledge to the prosecutor's admittedly vindictive and retaliatory reindictment of respondent, following the breakdown of plea negotiations, is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea bargaining process as well as the free exercise of constitutional rights.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, J. Vincent Aprile, II, Counsel for respondent, hereby certify that the attached Brief for Respondent in Opposition, Motion for Leave to Proceed in Forma Pauperis, Affidavit of Indigency, and Notice of Appearance were served on petitioner by hand delivering copies of the aforementioned documents, on May 16, 1977, to respondent's counsel, Robert L. Chenoweth, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

J. Vincent Aprile, II

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